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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 14-13254-scc

5 - - - - -x

6 In the Matter of:

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8 199 EAST 7TH STREET LLC,

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10 Debtor.

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12 - - - - -x

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14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 October 13, 2016

19 2:22 PM

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21 B E F O R E:

22 HON. SHELLEY C. CHAPMAN

23 U.S. BANKRUPTCY JUDGE

24

25

Doc #75 Ex Parte Application of the Chapter 7 Interim Trustee  
for an Order (I) Directing the Preservation of Documents and  
Recorded Information and (II) Authorizing the Issuance of  
Subpoenas for the Production of Documents and Deposition  
Testimony Pursuant to Rule 2004 of the Federal Rules of  
Bankruptcy Procedure

Doc #109 Order to Show Cause (A) Scheduling a Hearing to  
Consider Entry of a Contempt Citation and the Imposition of  
Sanctions and (B) Directing James Guarino, the Debtor's  
Managing Member, to Attend Such Hearing

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2 A P P E A R A N C E S :

3 LAW OFFICE OF DAVID CARLEBACH

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9 BY: DAVID CARLEBACH, ESQ.

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13 Attorneys for Chapter 7 Trustee

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17 BY: NEIL BERGER, ESQ.

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UNITED STATES DEPARTMENT OF JUSTICE

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Office of the United States Trustee

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201 Varick Street

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BY: BRIAN S. MASUMOTO, ESQ.

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NEW YORK CITY LAW DEPARTMENT

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BY: GABRIELA P. CACUCI, ESQ.

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20

ALSO PRESENT:

21

JAMES GUARINO, Debtor's Principal

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## 199 EAST 7TH STREET LLC

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1 P R O C E E D I N G S

2 THE COURT: Please have a seat. Come on up, folks.  
3 I'm sorry to keep you waiting. I'm in the midst of another  
4 matter as well.

5 Okay, Mr. Berger, would you like to start?

6 MR. BERGER: I think so, Judge, thank you. I'm Neil  
7 Berger of Togut, Segal & Segal. We represent Albert Togut, the  
8 Chapter 7 interim trustee. There are two matters on Your  
9 Honor's calendar today. If I could take the trustee's request  
10 for a final order to preserve documents first?

11 Your Honor may recall that was the trustee's  
12 application on September 22nd, at docket 75. You entered an  
13 order authorizing the trustee to conduct Rule 2004 discovery by  
14 an order at docket 76. You entered a scheduling order  
15 scheduling today's hearing with your October 5, 2016 order, at  
16 docket 108. Affidavits of service are on file with the court.

17 Last time we were before Your Honor, the debtor had  
18 consented to the relief. We've received no objections. Just  
19 by way of update, I can tell you we've been in touch with the  
20 title company. We sent them a subpoena. They've begun sending  
21 us documents.

22 THE COURT: Okay.

23 MR. BERGER: They've been complying. We spoke to  
24 counsel for the co-op board. They have no objection. They're  
25 sending us documents and complying. We've been in touch with

## 199 EAST 7TH STREET LLC

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1 two different attorneys who at different times represented the  
2 buyer. The first told us that he began doing the  
3 representation; he's going to look for documents, send them to  
4 us, no objection.

5 THE COURT: Okay.

6 MR. BERGER: The second is more challenging. It's an  
7 attorney who is under federal indictment. I think we are  
8 competing with a subpoena from a U.S. Attorney in a matter  
9 unrelated to this case.

10 THE COURT: Okay.

11 MR. BERGER: But he has at least indicated willingness  
12 to try to get into his records and give us documents. But with  
13 that, Your Honor, we don't have any objections. We articulated  
14 the basis for the need for preservation of the records in our  
15 application. I spoke to it last time we were here. And unless  
16 you have other questions, I'd ask that the motion be granted on  
17 a final basis.

18 THE COURT: Okay. Anyone else wish to be heard? Sir?

19 MR. CARLEBACH: May I be heard? May I approach the  
20 bench?

21 THE COURT: Yes.

22 MR. CARLEBACH: Your Honor, this is my client, Mr.  
23 Guarino. He's asked to address the Court.

24 THE COURT: Okay, Mr. Carlebach, is he, in fact your  
25 client or did you misspeak?

**199 EAST 7TH STREET LLC**

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1 MR. CARLEBACH: Excuse me?

2 THE COURT: Is your client not the debtor?

3 MR. CARLEBACH: He is the principal of the debtor.

4 THE COURT: Yes, there is a very substantial  
5 difference between the principal of the debtor and the debtor.

6 So I'm asking you again: are you representing Mr. Guarino?

7 MR. CARLEBACH: I do not represent him personally, no.  
8 He is the principal of the debtor, and he wants to address the  
9 Court as the principal of the debtor, not as --

10 THE COURT: Okay. I was focusing on very precisely on  
11 the words. You said your client. And I'm just clarifying that  
12 your client is the debtor, correct?

13 MR. CARLEBACH: Was and always has been.

14 THE COURT: Okay. Then you misspoke, and you meant to  
15 say the principal of your client?

16 MR. CARLEBACH: Perhaps.

17 THE COURT: No, this is a very important point, Mr.  
18 Carlebach.

19 MR. CARLEBACH: There was never any intention on my  
20 part to -- I've never, in this courthouse, taken the position  
21 that I represent Mr. Guarino personally.

22 THE COURT: You just said your client -- you'd like  
23 your client, Mr. Guarino to speak.

24 MR. CARLEBACH: In his capacity as an officer of the  
25 debtor. That's what I meant "my client". I didn't mean my

## 199 EAST 7TH STREET LLC

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1 client -- he's my personal client. I mean, I'm not sure what  
2 the -- where Your Honor is going with this. I mean, that's all  
3 I intended.

4 THE COURT: I'll tell you exactly where I'm going with  
5 this --

6 MR. CARLEBACH: Okay.

7 THE COURT: -- if you'd like me to do that, because I  
8 think every other person in this courtroom understands.  
9 There's a very real difference between a debtor and a debtor's  
10 principal. And the interests are distinct and are oftentimes  
11 in conflict, as seems to have occurred in this case. So when  
12 you stand up and you said I'd like -- he's my client, I simply  
13 was trying to understand what you meant by those literal words.  
14 And I was seeking to clarify that what you meant was, number  
15 one, your client was and is the debtor, okay. And now, of  
16 course, the trustee is in place, that's not what I'm getting  
17 at. I was merely drawing the distinction between your being  
18 counsel to the debtor and counsel to Mr. Guarino, in any  
19 individual capacity. That's all.

20 MR. CARLEBACH: Understood. And I just want to add  
21 that Mr. Guarino also happens to be an equity holder, and there  
22 certainly could come a point where in his capacity as an equity  
23 holder he might need separate -- he might decide he needs  
24 separate counsel. But I have never blurred the line in my own  
25 mind between Mr. Guarino personally; and my representation has



## 199 EAST 7TH STREET LLC

9

1 always only been with respect to my fiduciary obligation to  
2 respect -- to represent the debtor, the estate, its interest-  
3 holders, and creditors.

4 THE COURT: We've now gone far afield. I could say  
5 some things in response to that, but it would be beside the  
6 point.

7 Mr. Guarino wanted to make a statement to the Court,  
8 and just to clarify, he is not represented by counsel here  
9 today?

10 MR. CARLEBACH: He is not represented in his  
11 individual capacity by counsel. But insofar as his -- he wants  
12 to speak on behalf of the corporation. The corporation does  
13 have a lawyer, and that's me. But --

14 THE COURT: That's fine.

15 MR. CARLEBACH: Okay.

16 THE COURT: That's fine.

17 MR. CARLEBACH: Okay. Just making that clear.

18 THE COURT: Okay. Okay.

19 MR. CARLEBACH: Yeah.

20 THE COURT: Sir? Before you speak, I just want to  
21 clarify with everyone, in particular Mr. Berger, that as of  
22 today, neither the debtor nor -- well, it's not neither/nor,  
23 because it's three -- the debtor, Mr. Carlebach, and Mr.  
24 Guarino have not complied with the existing orders?

25 MR. BERGER: They have not complied with the

## 199 EAST 7TH STREET LLC

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1 conversion order. They have not complied with Your Honor's  
2 Rule 2004 order or the subpoenas that were issued by the  
3 trustee pursuant to your order.

4 THE COURT: Thank you. Okay. Go ahead.

5 MR. GUARINO: Thank you, Your Honor. My name is James  
6 Guarino.

7 THE COURT: Okay, pull that microphone nice and close  
8 so we can record.

9 MR. GUARINO: Thank you.

10 THE COURT: Okay.

11 MR. GUARINO: Hello?

12 THE COURT: Yes.

13 MR. GUARINO: My name is James Guarino. I'm speaking  
14 on behalf of 199 East 7th Street LLC. I'm the managing member  
15 and basically decision-maker in the entity.

16 I have plenty of bankruptcy experience, but never once  
17 as a debtor. I've been a lender in many different cases --

18 THE COURT: Um-hum.

19 MR. GUARINO: -- and I'm always the guy who cuts  
20 deals. I'm non-litigious, and move on, and so on and so forth.

21 I was first made aware that there was an issue with  
22 this case about four or five weeks ago. And I first heard from  
23 an outside attorney who emailed me and said what's happening.

24 I was under the impression the case was dismissed, was done.  
25 It was a very simple bankruptcy. Everybody was paid. To the

## 199 EAST 7TH STREET LLC

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1 best of my knowledge, there were no issues. And --

2 THE COURT: What was the basis of that knowledge?

3 MR. GUARINO: I was -- no communication that there was  
4 an issue. I heard there was one question of a creditor, of a  
5 tenant who made a claim, who got paid 100,000 dollars to leave,  
6 and I found out last night that the title company never paid  
7 transfer tax, but at the --

8 THE COURT: How do you think that that person got paid  
9 100,000 dollars to -- as you say -- leave?

10 MR. GUARINO: I paid him. We paid them -- the entity  
11 paid them. Not me personally, but the entity paid him. He  
12 made it --

13 THE COURT: Do you understand that that's a violation  
14 of the bankruptcy law?

15 MR. GUARINO: I did not know that, no. I asked during  
16 the process of the sale, my counsel, if this tenant wants to be  
17 bought out, is it okay and it makes the assets more valuable,  
18 and I was told it was okay. I did it to my L and T lawyer --

19 THE COURT: I'm just going to ask you to stop for  
20 moment.

21 MR. GUARINO: Okay.

22 THE COURT: Because I have a level of discomfort with  
23 this, and I'll explain to you why. I don't know all the facts.

24 MR. GUARINO: Okay.

25 THE COURT: I only know what I know.

**199 EAST 7TH STREET LLC**

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1 MR. GUARINO: Okay.

2 THE COURT: And what I know is that numerous orders  
3 that were entered by this Court --

4 MR. GUARINO: Right.

5 THE COURT: -- were not followed.

6 MR. GUARINO: Right.

7 THE COURT: And numerous actions and activities  
8 occurred that required court approval, and court approval was  
9 not sought.

10 MR. GUARINO: Right.

11 THE COURT: Mr. Carlebach does not agree with my  
12 views, and he's made that clear to me on numerous occasions and  
13 in numerous pleadings.

14 MR. GUARINO: Right.

15 THE COURT: To the extent that you are making these  
16 statements today, it is possible that you are saying things  
17 that could subject you to liability --

18 MR. GUARINO: Okay.

19 THE COURT: -- in a very serious fashion --

20 MR. GUARINO: Okay.

21 THE COURT: -- that you are indicating possibly a  
22 basis for someone to make the observation that you've committed  
23 things that would constitute bankruptcy crimes.

24 MR. GUARINO: Okay.

25 THE COURT: There's a statute, and it sets forth with

## 199 EAST 7TH STREET LLC

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1 great particularity what it is that constitutes a bankruptcy  
2 crime.

3 MR. GUARINO: Okay.

4 THE COURT: That's point number one. Point number two  
5 is, in your capacity as a principal and an officer of the  
6 debtor, to the extent that Mr. Carlebach was acting as counsel  
7 to the debtor, there exists an attorney-client privilege  
8 between you and him.

9 MR. GUARINO: Okay.

10 THE COURT: You, at this point, don't have counsel.  
11 I'm not permitted to give you legal advice, but as a general  
12 matter, you ought not to say anything that waives that  
13 privilege, because that's a very important thing for you to  
14 have.

15 MR. GUARINO: I understand.

16 THE COURT: Okay. In this situation, I normally  
17 suggest that you or someone in your position think very hard  
18 about continuing to speak without having the benefit of  
19 counsel, and that you do have available to you the invocation  
20 of the Fifth Amendment of the Constitution, which as you may or  
21 may not know, among other things, includes the right to not  
22 incriminate yourself by, in essence, saying things that could  
23 expose you to criminal liability.

24 MR. GUARINO: Understood, and I appreciate that.

25 THE COURT: Okay? So I'm happy to continue to listen

## 199 EAST 7TH STREET LLC

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1 to you, but I wanted to caution you in that regard, because  
2 right off the top, what you said is troubling, because it  
3 indicates that a payment was made -- yet another payment was  
4 made without court authority.

5 MR. GUARINO: I understand that. Because I -- and  
6 I --

7 THE COURT: I don't know what all the facts are.

8 MR. GUARINO: -- I understand.

9 THE COURT: Okay. Why it was that the funds left this  
10 estate without a court order and you came to believe or were  
11 led to believe that the bankruptcy was done, I have no idea.

12 MR. GUARINO: I understand. I appreciate that. I  
13 would like to request to replace counsel on this case --

14 THE COURT: Well, counsel is replaced on this case,  
15 and that's where the trustee comes in.

16 MR. GUARINO: Okay.

17 THE COURT: I converted the case.

18 MR. GUARINO: Right.

19 THE COURT: Okay? And a trustee is now acting. So  
20 all of the powers and the property and the rights to pursue  
21 causes of action and various rights and remedies are now in  
22 vested in the trustee.

23 Mr. Carlebach, on behalf of the debtor, appealed the  
24 conversion order and sought a stay of the conversion order --

25 MR. GUARINO: Right.

## 199 EAST 7TH STREET LLC

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1 THE COURT: -- and Judge Sullivan, apparently, acting  
2 as the emergency judge in the district court, I think, within  
3 moments has entered an order denying the stay.

4 MR. GUARINO: Right.

5 THE COURT: So my order -- my conversion order is up  
6 on appeal.

7 MR. GUARINO: Right.

8 THE COURT: But it's not stayed.

9 MR. GUARINO: Right.

10 THE COURT: And what that means is that you  
11 personally, right now, are in contempt of my order --

12 MR. GUARINO: Okay.

13 THE COURT: -- by having not returned the funds to the  
14 possession of the trustee or turned over documents that you  
15 have. So that's a pretty serious thing.

16 MR. GUARINO: I get that now.

17 THE COURT: So if you -- if you want counsel, that's  
18 certainly your right --

19 MR. GUARINO: Okay.

20 THE COURT: -- and I would give you some breathing  
21 room to get counsel.

22 MR. GUARINO: I would appreciate that.

23 THE COURT: But it will be your personal counsel, paid  
24 for by you --

25 MR. GUARINO: Right.

## 199 EAST 7TH STREET LLC

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1 THE COURT: -- and not out of the funds of this  
2 estate.

3 MR. GUARINO: Right, no problem. And to represent me  
4 and the entity in this case?

5 THE COURT: Well --

6 MR. GUARINO: I would like to replace Mr. Carlebach,  
7 is what I'm saying.

8 THE COURT: Mr. Berger, do you want to weigh in here?

9 MR. BERGER: I don't think that's appropriate, Your  
10 Honor. Mr. Carlebach currently is the attorney of record. I  
11 think you properly observed that the trustee is now in control  
12 of the property of the estate, documents, money that ought to  
13 come back, intangible assets.

14 I'm concerned with the corporate debtor not being  
15 represented in the trustee's Chapter 7 administration. So that  
16 to the extent that Mr. Guarino is unable to comply with the  
17 debtor's obligations, he may have personal counsel, but not  
18 anyone with institutional knowledge of what's gone on here.  
19 I'm also concerned, Your Honor, that counsel be relieved and  
20 that would be some type of waiver of estate claims or right to  
21 investigate.

22 THE COURT: Mr. Carlebach?

23 MR. CARLEBACH: I mean, I think what Mr. Guarino is  
24 saying is that -- I mean, even after a trustee is appointed,  
25 there is still a debtor, and --



## 199 EAST 7TH STREET LLC

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1 THE COURT: Mr. Berger doesn't disagree.

2 MR. CARLEBACH: And that debtor still takes --  
3 whatever he does, takes instruction from Mr. Guarino, as  
4 principal of the debtor; and that debtor has its inviolable  
5 right to counsel. If Mr. Guarino wants to replace me as that  
6 counsel, obviously I'm here and I'm under subpoena, and to the  
7 extent Mr. Guarino gets another attorney, I'd have to cooperate  
8 with that attorney, but if he feels that he'd be better  
9 served -- if the corporate debtor would be better served today  
10 by having another attorney interface with the trustee, I mean,  
11 I can't -- I don't see the harm in having maybe another counsel  
12 who's less caught up in the moment. And I don't see why Mr.  
13 Guarino, as principal of the debtor, wouldn't have the absolute  
14 right to fire me and hire somebody else.

15 THE COURT: Well -- go ahead.

16 MR. BERGER: Just quickly, Your Honor. First, I don't  
17 disagree with Your Honor. A few days for Mr. Guarino to get  
18 counsel is a good idea. I think you've identified some issues  
19 that I think a number of us sitting at counsel table  
20 immediately identified as soon as he began speaking.

21 Withdrawal of counsel or substitution of counsel,  
22 under our Local Rules, requires notice of a motion --

23 THE COURT: And court approval.

24 MR. BERGER: -- and a court approval.

25 THE COURT: Right.

## 199 EAST 7TH STREET LLC

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1 MR. BERGER: I'm not prepared, standing here today, to  
2 throw the doors open and say yes, counsel's out, and we'll just  
3 wait and see if someone else comes in. We're all very  
4 sensitive to process here --

5 THE COURT: Right.

6 MR. BERGER: -- and getting the estate done. But --

7 THE COURT: And what I see -- what I see is -- and  
8 it's ironic in light of what was argued to me in the stay  
9 motion -- that we now have the specter of multiplying costs,  
10 not on this side, because Mr. Guarino, your -- the cost of your  
11 counsel is going to come out of your pocket --

12 MR. GUARINO: I understand.

13 THE COURT: -- okay. And with respect to the debtor,  
14 too, now that there's a trustee --

15 MR. GUARINO: I understand.

16 THE COURT: Right. So --

17 MR. GUARINO: Now.

18 THE COURT: -- so to go to a situation where we have  
19 three counsel instead of one, the most I can see is two,  
20 because I think it would be beneficial, Mr. Guarino, to you for  
21 you to have your personal counsel, but we're getting very far  
22 afield from what needs to be done here.

23 I said at the last hearing, we can do things the easy  
24 way or we can do things the hard way. Okay? Mr. Carlebach's  
25 notion of the easy way was basically that I forget the whole

## 199 EAST 7TH STREET LLC

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1 thing, okay, and not require that the monies come back in, and  
2 that we figure out why the transfer taxes weren't paid or if  
3 they weren't paid. I still don't know all the facts.

4 But now we're going from -- so I wasn't going to do  
5 the super easy way, which was let's just pretend this never  
6 happened, but the hard way is now being suggested become even  
7 harder by all these counsel.

8 It's very simple. The money has to come back in and  
9 all the documents need to be produced. Period. And right now,  
10 there is the existence of contempt of those aspects of the  
11 conversion order. And the next level is sanctioning. I want  
12 to see the money come back in. I want the trustee to have all  
13 the documents to understand what did or did not happen. And  
14 then we're going to go -- and then we're going to go from  
15 there.

16 Again, we still have the ability to do this the easier  
17 way than the harder way, and that just involves full  
18 compliance. The position that was taken in the stay pending  
19 appeal -- in the motion for stay pending appeal was squarely  
20 rejected by Judge Sullivan. I don't know who has had an  
21 opportunity to see this. Have you seen this, Mr. Carlebach?

22 MR. CARLEBACH: I did see it.

23 THE COURT: Mr. Guarino --

24 MR. GUARINO: No.

25 THE COURT: -- have you seen it? We'll give you a

**199 EAST 7TH STREET LLC**

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1 copy.

2 MR. GUARINO: Thank you.

3 THE COURT: So how much time do you need, Mr. -- well,  
4 first of all, do you --

5 MR. GUARINO: With the transfer --

6 THE COURT: Yeah, yeah --

7 MR. GUARINO: -- I'm okay getting an additional  
8 attorney for myself. It's not an issue, if that --

9 THE COURT: Okay.

10 MR. GUARINO: I'm sorry.

11 THE COURT: Okay.

12 MR. GUARINO: If that's okay with Mr. Berger.

13 THE COURT: Okay.

14 MR. GUARINO: I'm okay with that. I tried to get an  
15 attorney to come here today, except with the holidays, it was  
16 very difficult to reach somebody.

17 THE COURT: Sure.

18 MR. GUARINO: I found out last week.

19 THE COURT: Okay.

20 MR. GUARINO: And contempt of court came up, which is  
21 very scary. So you know, I plan on using previous counsel that  
22 I used.

23 THE COURT: Okay.

24 MR. GUARINO: So he's a phone call away. I don't need  
25 much time.

## 199 EAST 7TH STREET LLC

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1 THE COURT: Okay.

2 MR. GUARINO: As far as the documents, I found out in  
3 the hallway that the documents were never turned over. Why, I  
4 don't know. There's nothing to hide. And as far as putting  
5 the money in the account, I don't have the liquidity around but  
6 I have free and clear assets, which I'm in the process of  
7 refinancing. I offered to pledge an asset outside -- you  
8 know, until the financing comes in. I'm fully cooperative.  
9 I'm going nowhere. I'm --

10 THE COURT: Well --

11 MR. GUARINO: -- you know.

12 THE COURT: Given that you've indicated that you'd  
13 like to hire counsel, I'm going to refrain from asking you  
14 further questions --

15 MR. GUARINO: Okay.

16 THE COURT: -- as to where the money is.

17 MR. GUARINO: Fair.

18 THE COURT: But once you do have counsel, those  
19 questions are going to be --

20 MR. GUARINO: No problem.

21 THE COURT: -- on the table. Certainly the trustee  
22 and the U.S. Trustee, I think, is going to be interested --

23 MR. GUARINO: No problem.

24 THE COURT: -- in getting the answers to those --

25 MR. GUARINO: And I'll be transparent. It's not an

## 199 EAST 7TH STREET LLC

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1 issue.

2 THE COURT: -- questions, among others.

3 So in terms of a time frame, I want to keep this  
4 easier. I want to keep it moving, because it's very unclear to  
5 me at this point how/if the trustee and his counsel are going  
6 to be paid. And I really -- I don't like to put counsel in  
7 that situation.

8 And where are we with the transfer taxes? Do -- have  
9 you --

10 MS. CACUCI: Well, I did file a letter.

11 THE COURT: Which I've seen. An additional letter?

12 MS. CACUCI: No.

13 THE COURT: Right.

14 MS. CACUCI: Advising the court of the rate and the  
15 amount and --

16 THE COURT: Right. But they still haven't -- it still  
17 hasn't been paid?

18 MS. CACUCI: No.

19 MR. BERGER: And Judge, I received a -- from the title  
20 company --

21 MS. CACUCI: It has to be filed electronically, Your  
22 Honor, on --

23 THE COURT: Right.

24 MR. BERGER: But there's --

25 THE COURT: There's nothing more from where we were

## 199 EAST 7TH STREET LLC

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1 last time.

2 MS. CACUCI: Right.

3 THE COURT: Right.

4 MS. CACUCI: Which is that I explained to the Court  
5 that because the sale was in bulk, the rate is the higher  
6 rate -- is the 2.65 percent of the consideration. So the  
7 amount is 43,000 and change, as indicated in my letter, not the  
8 23,000.

9 THE COURT: Okay.

10 MR. BERGER: Right, and Judge, Neil Berger for the  
11 trustee. We've been in contact with the title company,  
12 responsive to our subpoena. They sent us a copy of the check  
13 drawn from Mr. Carlebach's IOLA account, and handwritten across  
14 is "not cashed, no executed transfer documents received". So  
15 the title company is telling us they never cashed the check,  
16 which leads us to believe that those funds, that 30,000  
17 dollars, is still in Mr. Carlebach's IOLA account, which ought  
18 to be turned over to the trustee immediately.

19 The check for the transfer tax was drawn on an IOLA  
20 account, and Mr. Carlebach, if the check has not been cashed,  
21 they have not cleared out of the IOLA --

22 THE COURT: Okay, so --

23 MR. BERGER: -- account.

24 THE COURT: -- but the good news in this is that from  
25 that money, we're going to be able to pay the transfer tax,

## 199 EAST 7TH STREET LLC

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1 right?

2 MR. BERGER: At least --

3 MS. CACUCI: It's insufficient, Your Honor.

4 MR. BERGER: It's insufficient, but at least -- the  
5 30,000 was drawn out of the IOLA account for Mr. Carlebach.  
6 What we're hearing from the City is that the transfer tax is  
7 actually 43,000. So there's a delta.

8 THE COURT: Okay. It's insufficient.

9 MR. BERGER: It is insufficient.

10 THE COURT: It is insufficient. Okay.

11 MR. BERGER: It's not sufficient.

12 MS. CACUCI: Right, and it's not just that amount.

13 Once you --

14 MR. BERGER: And there are penalties.

15 MS. CACUCI: -- once you file the return  
16 electronically --

17 THE COURT: Okay.

18 MS. CACUCI: -- the computer calculates the amount.

19 So there's significant penalties and interest --

20 THE COURT: Okay.

21 MS. CACUCI: -- so I cannot tell you exactly.

22 THE COURT: Okay.

23 MS. CACUCI: But the penalties can be substantial.

24 THE COURT: Okay. All right, so let me get this  
25 straight. So -- and Mr. Guarino, you don't have to respond to



## 199 EAST 7TH STREET LLC

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1 this.

2 So when the funds were all transferred to Mr. Guarino,  
3 Mr. Carlebach, in your iteration at his -- pursuant to his  
4 demand, you then demanded or requested that 30,000 dollars be  
5 transferred -- hold on -- be transferred back to you, which you  
6 were going to hold for your fees. No?

7 MR. CARLEBACH: What happened was, at the closing, I  
8 paid all the closing costs out of the -- there was a deposit of  
9 the purchaser. I paid out of the -- out of the deposit, I paid  
10 all the closing costs. The title company presented us with a  
11 bill of an exact amount. We filed that -- we filed all those  
12 documents.

13 I paid the exact amount that the title company asked  
14 for. They did not pay the transfer tax. They claimed that the  
15 transfer documents weren't executed. I thought we had executed  
16 everything at the closing. They never told us they weren't  
17 paying the transfer tax. That's what's happened here.

18 They didn't pay --

19 THE COURT: I'm asking a different question. When you  
20 thought the transfer taxes were paid, and there was then money  
21 left, okay --

22 MR. CARLEBACH: There is 30,000 sitting --

23 THE COURT: -- you --

24 MR. CARLEBACH: -- in my account from that uncashed  
25 check. I was waiting for that --

## 199 EAST 7TH STREET LLC

26

1 THE COURT: Plus 30,000 that you were keeping for your  
2 fees?

3 MR. CARLEBACH: Plus the 30,000 for my fees. That's  
4 correct.

5 THE COURT: Okay. So and that's still in your  
6 account?

7 MR. CARLEBACH: That's still in my account.

8 THE COURT: Okay. And why hasn't that been  
9 transferred to the trustee?

10 MR. CARLEBACH: Well, again, we were involved in the  
11 stay litigation, and all that stuff, and that's what -- I mean,  
12 I was hoping that the district court was going to stay that  
13 turnover order.

14 THE COURT: Okay. So the district court has not  
15 stayed --

16 MR. CARLEBACH: And I --

17 THE COURT: -- has not.

18 MR. CARLEBACH: -- and I understand that to the extent  
19 that we're not going to be -- Mr. Guarino seems like he wants  
20 to comply with the order and not engage in any further stay  
21 litigation, we'll turn it over. It's not an issue.

22 MR. BERGER: But both amounts.

23 THE COURT: Well --

24 MR. BERGER: The 30,000 that he's holding --

25 MR. CARLEBACH: Underst --

## 199 EAST 7TH STREET LLC

27

1 MR. BERGER: -- for the transfer tax --

2 MR. CARLEBACH: -- understood.

3 MR. BERGER: -- and the 30,000 that he got from the  
4 debtor for fees need to come to the trustee. That should have  
5 been turned over by now.

6 THE COURT: Well --

7 MR. CARLEBACH: If the trustee could just send me his  
8 wire instructions, and I'll send that money back over. It's  
9 not an issue.

10 THE COURT: Okay. So just to be clear, because I  
11 don't want there to be any misunderstanding, you should have --  
12 after that, you should have zero --

13 MR. CARLEBACH: That's correct.

14 THE COURT: -- in your trust fund --

15 MR. CARLEBACH: Right.

16 THE COURT: -- accounts.

17 MR. CARLEBACH: That's correct.

18 THE COURT: Is that correct? A hundred percent  
19 correct?

20 MR. CARLEBACH: That's a one hundred percent correct.  
21 It's in --

22 MR. BERGER: The easiest way to do that, Your Honor,  
23 is to have Mr. Carlebach -- I prefer checks -- send a check.  
24 We'll send a messenger to your office, if you'd like. And we'd  
25 like a written statement confirming that all debtor funds that

## 199 EAST 7TH STREET LLC

28

1 were in his IOLA account have now been transferred to the  
2 trustee.

3 THE COURT: Why wouldn't you do that, Mr. Carlebach?

4 MR. CARLEBACH: I don't have a problem. I like -- I  
5 prefer to do a wire transfer. If they want a check, I can  
6 write a check. To me it's --

7 MR. BERGER: I'll contact you after today's hearing --

8 MR. CARLEBACH: Okay.

9 MR. BERGER: -- but simply understanding how best to  
10 wire money into a trustee account, I just need to get the wire  
11 instructions from the trustee's fiduciary accountant. That's  
12 all.

13 MS. CACUCI: Your Honor, if I may? I believe that  
14 under the current situation, whenever the funds are going to be  
15 available and so on, it's going to have to be the trustee that  
16 files, at this point, the real property transfer tax return.

17 THE COURT: Yes.

18 MR. BERGER: And I envision that as well.

19 MS. CACUCI: Fine. No, when the Court asked me  
20 whether somebody paid it, I mean, I think at this point the  
21 trustee has to --

22 MR. BERGER: Yes.

23 THE COURT: No, I wasn't -- you have to understand  
24 that -- I'm sorry. I don't mean "you have to understand".  
25 What I'm recalling is that when we started this phase, Mr.

## 199 EAST 7TH STREET LLC

29

1 Carlebach indicated either in a writing or on the record, that  
2 the transfer taxes had been paid.

3 MS. CACUCI: Right.

4 THE COURT: And we've since learned that they haven't  
5 been paid.

6 MS. CACUCI: Right.

7 THE COURT: So yes, you're going to get the transfer  
8 taxes paid. Yes, Mr. Berger -- Mr. Togut is the only person  
9 authorized to do that.

10 MS. CACUCI: Right.

11 THE COURT: And in order to do that, he's going to get  
12 all these funds and look at all the numbers. I believe that  
13 you're going to be first in line to get that money, but I don't  
14 know that for sure, but I don't know what I don't know, at this  
15 point.

16 MR. BERGER: I don't know that. I won't disagree with  
17 what Your Honor just said. I'm a bankruptcy attorney. We're  
18 going to have an estate with receipts and an estate with  
19 disbursements and an estate that has to file transfer tax  
20 returns and estate returns. We work with accountants who are  
21 extremely efficient; but Ms. Cacuci, you should anticipate that  
22 the trustee will retain an accountant who will hopefully have  
23 limited duties, including preparing a transfer tax return to be  
24 filed, ultimately, with the City.

25 First we need the money.

## 199 EAST 7TH STREET LLC

30

1 THE COURT: We do. Now, whether or not the trustee is  
2 willing to entertain and accept something short of the money  
3 being returned, we'll get to that when we get to that, because  
4 right now, you don't have counsel. But right now I want to  
5 make it very clear, you are in contempt of my order.

6 MR. GUARINO: I understand, Your Honor.

7 THE COURT: Okay? And that needs to have  
8 consequences. I could enter sanctions today.

9 Mr. Carlebach, with respect to your compliance, you're  
10 indicating that you're going to remit the funds to the trustee  
11 either by wire or by check, along with a statement -- an  
12 affirmation that there are no further funds remaining in your  
13 account. But you are also required to turn over documents.

14 MR. CARLEBACH: Understood. I --

15 THE COURT: So -- and you are in contempt today. So I  
16 know that the holidays -- that the holiday was and that there  
17 are other holidays coming up. So in order to provide a basis  
18 for me not to impose sanctions today, I need to hear from you  
19 about the timeline for compliance.

20 Mr. Berger, do you have something to day?

21 MR. BERGER: I'm sorry, Your Honor. Just one other  
22 point. And I don't mean to be oppressive, but --

23 THE COURT: Mr. Carlebach, last time you said you were  
24 going to produce the documents by the 7th of October. That was  
25 a week ago.

## 199 EAST 7TH STREET LLC

31

1 MR. BERGER: Right, the 7th at 4 o'clock, which was an  
2 extension of the original response deadline.

3 If I can, before we get back into discovery, when Mr.  
4 Carlebach turns over the funds to the trustee that are in his  
5 account, if I didn't say it earlier -- and I simply can't  
6 recall -- the written representation should also include an  
7 accounting of funds received from and on behalf of the debtor  
8 and how they were disbursed. That way we have a very clear  
9 picture and a very clear comfort level that everything is being  
10 turned over.

11 MR. CARLEBACH: Not a problem.

12 THE COURT: Okay.

13 MR. BERGER: Great.

14 THE COURT: All right, now --

15 MR. BERGER: On --

16 THE COURT: -- on the documents.

17 MR. BERGER: -- on the documents, Your Honor -- and  
18 the original response date on the subpoenas was the 29th. The  
19 debtor requested an extension to October 7th. Today is the  
20 13th. We still don't have documents from Mr. Carlebach, the  
21 debtor, or Mr. Guarino in his individual capacity, as a member  
22 of the debtor.

23 I understand that Mr. Guarino would like a few days to  
24 get counsel. It sounds like a good idea. I'd rather not run  
25 up the fees, but I don't want to be left with the trustee

## 199 EAST 7TH STREET LLC

32

1 wondering when documents will be produced and whether or not we  
2 should be submitting an order that includes, of course, an  
3 element to it to obtain compliance.

4 I think, Your Honor, what we can do is have documents  
5 produced to us by Wednesday the 19th, and have a holding date  
6 on the 20th. If I don't get documents, I can come back in  
7 front of Your Honor and we can have another conference.

8 THE COURT: Okay, help me out, Mr. Carlebach, about  
9 the dates of Sukkot that would render you --

10 MR. CARLEBACH: The first two days of Sukkot are the  
11 17th and the 18th. So I was going to suggest the 20th to give  
12 me the extra day after, because I can't -- I don't do any work  
13 on the 17th and the 18th. So if we can push that over one day,  
14 the 19th, I can go through everything, my emails. And I think  
15 I probably could give a reasonable production on the 20th.

16 THE COURT: Well, now you've got me at "reasonable  
17 production". If we set the 19th as the deadline, that's the  
18 deadline for -- would be complete production, given that that  
19 would be a healthy three weeks out from the original deadline.

20 So I believe that it is appropriate for you to make  
21 the complete production by the close of business -- and I'll  
22 tell you what, let's say by the end of the day on the 20th to  
23 give you an extra day, because Saturday is out, Monday and  
24 Tuesday will be out. So that gives you tomorrow and Sunday and  
25 Wednesday to be able to look at your files, which really



## 199 EAST 7TH STREET LLC

33

1 shouldn't be voluminous, given what a simple case this is.

2 And I will say, though, that a complete production  
3 needs to be made by the close of business on the 20th, and that  
4 every -- for every twenty-four hours after that, for which  
5 there is not compliance, will levy a hundred-dollar fine on you  
6 personally.

7 MR. CARLEBACH: Understood.

8 MR. BERGER: So order the record, please?

9 THE COURT: Yes. The record is so ordered, in that  
10 regard.

11 Now, with respect to a deadline for Mr. Guarino, let  
12 me hear from you, Mr. Berger.

13 MR. BERGER: I'd prefer production of the same date.  
14 An attorney who Mr. Guarino says is a phone call away, is  
15 simply going to look at the subpoena. Mr. Guarino, apparently,  
16 is the person with the documents and the information.  
17 Privilege is now with the trustee. It's simply an act of  
18 gathering and producing. So I'd ask for the same deadline.

19 MR. GUARINO: No problem. I -- sorry.

20 THE COURT: No problem.

21 MR. GUARINO: I don't have a problem with that. I  
22 just want to make sure my understanding is my production is the  
23 financial records, not the legal papers. I don't know that I  
24 have all of that stuff, but the financial records.

25 THE COURT: Whatever you have --

**199 EAST 7TH STREET LLC**

34

1 MR. GUARINO: Yeah.

2 THE COURT: -- relating to this matter --

3 MR. GUARINO: Yeah.

4 THE COURT: -- needs to be turned over.

5 MR. GUARINO: Okay.

6 THE COURT: And that includes correspondence with Mr.

7 Carlebach --

8 MR. GUARINO: Okay.

9 THE COURT: -- or anything --

10 MR. GUARINO: Emails, I have. I'm just not sure that

11 I have --

12 THE COURT: Emails.

13 MR. GUARINO: -- copies of every motion. But I have

14 all the financial records and stuff --

15 MR. GUARINO: Text messages.

16 THE COURT: Yeah.

17 MR. GUARINO: No texts, but okay.

18 THE COURT: From any and all email accounts --

19 MR. GUARINO: Yeah.

20 THE COURT: -- that you have.

21 MR. GUARINO: Okay.

22 THE COURT: Whether it's Yahoo!, Gmail, whatever it

23 is.

24 MR. GUARINO: Yeah.

25 THE COURT: Any form of --

## 199 EAST 7TH STREET LLC

35

1 MR. GUARINO: Not a -- not a problem.

2 THE COURT: -- written communication, text message,  
3 anything that you have --

4 MR. GUARINO: Okay.

5 THE COURT: -- between yourself and Mr. Carlebach or  
6 anyone else relating to this --

7 MR. GUARINO: Okay.

8 THE COURT: -- you need to turn over.

9 MR. GUARINO: Okay.

10 THE COURT: Now you can -- your soon-to-be-retained  
11 attorney, Mr. Berger's a phone call away. They can work  
12 together on whether it's a disk or whether it's a physical  
13 production or whatever it is.

14 MR. GUARINO: Okay.

15 MR. BERGER: Your Honor, can we have the same per diem  
16 on him, or --

17 THE COURT: I'm going to give a little more leeway on  
18 that, simply because even though counsel may only be a phone  
19 call away, I have no way of knowing how quickly counsel can  
20 jump in. So I think it would be a little onerous to impose  
21 that without a first shot.

22 What I will do is, though, have you come back. And  
23 I'm just pausing to think about --

24 (Pause)

25 THE COURT: All right. Can I have you -- can we come

199 EAST 7TH STREET LLC

36

1 back in on the 25th, which is a Tuesday, or is that --

2 MR. CARLEBACH: That's still --

3 THE COURT: -- is that Simchat Torah?

4 MR. CARLEBACH: It is.

5 THE COURT: Okay. The 24th --

6 MR. CARLEBACH: Anything beyond the 25th is clear,  
7 from the holidays.

8 THE COURT: You're good on the 26th, Mr. Carlebach?

9 MR. CARLEBACH: I have a hearing before Judge Craig at  
10 2:30, but if we do it in the morning, it's fine.

11 MR. BERGER: That's fine with me, Judge.

12 THE COURT: Okay. 11 o'clock on the 26th for further  
13 status. And at that point, we would revisit the issue of there  
14 being sanctions associated with any continuing noncompliance,  
15 insofar as Mr. Guarino's production is concerned.

16 I will say, though, that as soon as you have counsel  
17 retained, he needs to contact Mr. Berger and immediately  
18 commence discussions about the return of the funds or any  
19 alternative that you have in mind that might satisfy compliance  
20 with that aspect of the conversion.

21 MR. GUARINO: That will happen right away. No  
22 problem.

23 THE COURT: Mr. Masumoto, anything from your office?

24 MR. MASUMOTO: No, Your Honor.

25 THE COURT: I see Mr. Masumoto sitting there.

## 199 EAST 7TH STREET LLC

37

1 MR. MASUMOTO: I believe you covered the matter that I  
2 was concerned about.

3 THE COURT: Okay. All right. So somebody ought to  
4 share the --

5 MS. CACUCI: I just did, Your Honor.

6 THE COURT: Okay. All right. Mr. Berger, anything  
7 else?

8 MR. BERGER: If I can email chambers with the order  
9 granting the injunctive relief on a final basis?

10 THE COURT: Yes.

11 MR. BERGER: I think we're finished for the day.

12 THE COURT: Okay. Okay, let me just take one quick  
13 look at my notes.

14 Okay, I think that's all. Okay, thank you folks.

15 IN UNISON: Thank you, Your Honor.

16 THE COURT: Thank you very much.

17 (Whereupon these proceedings were concluded at 2:59 PM)

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I N D E X

RULINGS

	PAGE	LINE
Mr. Carlebach will produce all documents by	33	2
end of business October 20th, after which a		
100-dollar fine will be incurred for each day		
of lack of compliance.		
Mr. Guarino will produce all documents by	35	17
end of business on October 20.		

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C E R T I F I C A T I O N

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4

I, Penina Wolicki, certify that the foregoing transcript is a  
5 true and accurate record of the proceedings.

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*Penina Wolicki*

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PENINA WOLICKI

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Date: October 16, 2016

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<b>A</b>	<b>Albert (1)</b> 5:7	<b>authorized (1)</b> 29:9	<b>bill (1)</b> 25:11	<b>6:9;8:11;10:22,24; 14:13,14,17;16:4; 33:1</b>
	<b>along (1)</b> 30:11	<b>authorizing (1)</b> 5:13	<b>blurred (1)</b> 8:24	<b>cases (1)</b> 10:17
<b>ability (1)</b> 19:16	<b>alternative (1)</b> 36:19	<b>available (2)</b> 13:19;28:15	<b>board (1)</b> 5:24	<b>cashed (3)</b> 23:14,15,20
<b>able (2)</b> 23:25;32:25	<b>always (3)</b> 7:13;9:1;10:19	<b>aware (1)</b> 10:21	<b>both (1)</b> 26:22	<b>caught (1)</b> 17:12
<b>absolute (1)</b> 17:13	<b>Amendment (1)</b> 13:20	<b>away (5)</b> 20:24;33:14;35:11, 19:36:21	<b>bought (1)</b> 11:17	<b>causes (1)</b> 14:21
<b>accept (1)</b> 30:2	<b>among (2)</b> 13:21;22:2	<b>B</b>	<b>breathing (1)</b> 15:20	<b>caution (1)</b> 14:1
<b>account (13)</b> 21:5;23:13,17,20, 23:24;5:25;24:26;6, 7;28:1,10;30:13;31:5	<b>amount (6)</b> 22:15;23:7;24:12, 18;25:11,13		<b>BRIAN (1)</b> 4:8	<b>certainly (3)</b> 8:22;15:18;21:21
<b>accountant (2)</b> 28:11;29:22	<b>amounts (1)</b> 26:22	<b>back (10)</b> 16:13;19:1,8,12; 25:5;27:8;31:3;32:6; 35:22;36:1	<b>bulk (1)</b> 23:5	<b>challenging (1)</b> 6:6
<b>accountants (1)</b> 29:20	<b>anticipate (1)</b> 29:21	<b>Bankruptcy (8)</b> 4:12;10:16,25; 11:14;12:23;13:1; 14:11;29:17	<b>business (2)</b> 32:21;33:3	<b>chambers (1)</b> 37:8
<b>accounting (1)</b> 31:7	<b>apparently (2)</b> 15:1;33:15	<b>basically (2)</b> 10:15;18:25	<b>buyer (1)</b> 6:2	<b>change (1)</b> 23:7
<b>accounts (2)</b> 27:16;34:18	<b>appeal (3)</b> 15:6;19:19,19	<b>basis (6)</b> 6:14,17;11:2; 12:22;30:17;37:9	<b>C</b>	<b>Chapter (2)</b> 5:8;16:15
<b>across (1)</b> 23:13	<b>appealed (1)</b> 14:23	<b>become (1)</b> 19:6		<b>check (9)</b> 23:12,15,19,20; 25:25;27:23;28:5,6; 30:11
<b>act (1)</b> 33:17	<b>application (2)</b> 5:12;6:15	<b>began (2)</b> 6:2;17:20	<b>CACUCI (21)</b> 4:17;22:10,12,14, 18,21;23:2,4;24:3,12, 15,18,21,23;28:13, 19;29:3,6,10,21;37:5	<b>checks (1)</b> 27:23
<b>acting (3)</b> 13:6;14:19;15:1	<b>appointed (1)</b> 16:24	<b>begun (1)</b> 5:20	<b>calculates (1)</b> 24:18	<b>Church (1)</b> 4:14
<b>action (1)</b> 14:21	<b>appreciate (3)</b> 13:24;14:12;15:22	<b>behalf (4)</b> 9:12;10:14;14:23; 31:7	<b>calendar (1)</b> 5:9	<b>CITY (3)</b> 4:11;24:6;29:24
<b>actions (1)</b> 12:7	<b>approach (1)</b> 6:19	<b>bench (1)</b> 6:20	<b>call (4)</b> 20:24;33:14;35:11, 19	<b>claim (1)</b> 11:5
<b>activities (1)</b> 12:7	<b>appropriate (2)</b> 16:9;32:20	<b>beneficial (1)</b> 18:20	<b>came (2)</b> 14:10;20:20	<b>claimed (1)</b> 25:14
<b>actually (1)</b> 24:7	<b>approval (4)</b> 12:8,8;17:23,24	<b>benefit (1)</b> 13:18	<b>can (20)</b> 5:19;10:8;18:19, 23,24;24:23;28:5; 31:3;32:4,6,7,13,14; 35:10,11,15,19,25, 25;37:8	<b>claims (1)</b> 16:20
<b>add (1)</b> 8:20	<b>argued (1)</b> 18:8	<b>Berger (52)</b> 5:5,6,7,23;6:6,11; 9:21,25;16:8,9;17:1, 16,24;18:1,6;20:12; 22:19,24;23:10,10, 23;24:2,4,9,11,14; 26:22,24;27:1,3,22; 28:7,9,18,22;29:8,16; 30:20,21;31:1,13,15, 17;33:8,12,13;35:15; 36:11,17;37:6,8,11	<b>capacity (6)</b> 7:24;8:19,22,9:11; 13:5;31:21	<b>clarify (3)</b> 8:14;9:8,21
<b>additional (2)</b> 20:7;22:11	<b>around (1)</b> 21:5	<b>Berger's (1)</b> 35:11	<b>CARLEBACH (67)</b> 6:19,22,24;7:1,3,7, 13,16,18,19,24;8:6, 20:9;10:15,17,19,23; 12:11;13:6;14:23; 16:6,10,22,23;17:2; 19:21,22;23:20;24:5; 25:3,7,22,24;26:3,7, 10,16,18,25;27:2,7, 13,15,17,20,23;28:3, 4,8;29:1;30:9,14,23; 31:4,11,20;32:8,10; 33:7;34:7;35:5;36:2, 4,6,8,9	<b>clarifying (1)</b> 7:11
<b>address (2)</b> 6:23;7:8	<b>articulated (1)</b> 6:13	<b>beside (1)</b> 9:5	<b>Carlebach's (3)</b> 18:24;23:13,17	<b>clear (8)</b> 9:17;12:12;21:6; 27:10;30:5;31:8,9; 36:6
<b>administration (1)</b> 16:15	<b>aspect (1)</b> 36:20	<b>best (2)</b> 11:1;28:9	<b>case (9)</b>	<b>cleared (1)</b> 23:21
<b>advice (1)</b> 13:11	<b>aspects (1)</b> 19:10	<b>better (2)</b> 17:8,9		<b>client (13)</b> 6:22,25;7:2,11,12, 15,22,23,25;8:1,1,12, 15
<b>Advising (1)</b> 22:14	<b>asset (1)</b> 21:7	<b>beyond (1)</b> 36:6		<b>close (3)</b> 10:7;32:21;33:3
<b>Affidavits (1)</b> 5:16	<b>assets (3)</b> 11:17;16:13;21:6			<b>closing (4)</b> 25:7,8,10,16
<b>affirmation (1)</b> 30:12	<b>associated (1)</b> 36:14			<b>comfort (1)</b> 31:9
<b>afield (2)</b> 9:4;18:22	<b>attorney (12)</b> 6:7,8;10:23;16:10; 17:7,8,10;20:8,15; 29:17;33:14;35:11			<b>coming (1)</b> 30:17
<b>again (3)</b> 7:6;19:16;26:10	<b>attorney-client (1)</b> 13:7			<b>commence (1)</b> 36:18
<b>ago (2)</b> 10:22;30:25	<b>attorneys (1)</b> 6:1			
<b>agree (1)</b> 12:11	<b>authority (1)</b> 14:4			
<b>ahead (2)</b> 10:4;17:15				



<b>committed (1)</b> 12:22	<b>co-op (1)</b> 5:24	25;37:3,6,10,12,16	<b>DEPARTMENT (2)</b> 4:2,11	31:5
<b>communication (2)</b> 11:3;35:2	<b>cooperate (1)</b> 17:7	<b>courthouse (1)</b> 7:20	<b>deposit (2)</b> 25:8,9	<b>easier (2)</b> 19:16;22:4
<b>company (7)</b> 5:20;11:6;22:20; 23:11,15;25:10,13	<b>cooperative (1)</b> 21:8	<b>courtroom (1)</b> 8:8	<b>diem (1)</b> 35:15	<b>easiest (1)</b> 27:22
<b>competing (1)</b> 6:8	<b>copies (1)</b> 34:13	<b>covered (1)</b> 37:1	<b>difference (2)</b> 7:5;8:9	<b>East (1)</b> 10:14
<b>complete (3)</b> 32:18,21;33:2	<b>copy (2)</b> 20:1;23:12	<b>Craig (1)</b> 36:9	<b>different (4)</b> 6:1,1;10:17;25:19	<b>easy (3)</b> 18:23,25;19:5
<b>compliance (6)</b> 19:18;30:9,19; 32:3;33:5;36:19	<b>corporate (2)</b> 16:14;17:9	<b>creditor (1)</b> 11:4	<b>difficult (1)</b> 20:16	<b>efficient (1)</b> 29:21
<b>complied (3)</b> 9:24,25;10:1	<b>Corporation (3)</b> 4:13;9:12,12	<b>creditors (1)</b> 9:3	<b>disagree (3)</b> 17:1,17;29:16	<b>either (2)</b> 29:1;30:11
<b>comply (2)</b> 16:16;26:20	<b>correspondence (1)</b> 34:6	<b>crime (1)</b> 13:2	<b>disbursed (1)</b> 31:8	<b>electronically (2)</b> 22:21;24:16
<b>complying (2)</b> 5:23,25	<b>cost (1)</b> 18:10	<b>crimes (1)</b> 12:23	<b>disbursements (1)</b> 29:19	<b>element (1)</b> 32:3
<b>computer (1)</b> 24:18	<b>costs (3)</b> 18:9;25:8,10	<b>criminal (1)</b> 13:23	<b>discomfort (1)</b> 11:22	<b>else (5)</b> 6:18;17:14;18:3; 35:6;37:7
<b>concerned (4)</b> 16:14,19;36:15; 37:2	<b>Counsel (39)</b> 4:13;5:24;8:18,18, 24:9,8,11;11:16; 13:6,10,19;14:13,14; 15:17,21,23;16:17, 19:17;5,6,11,18,19, 21,21;18:11,19,21; 19:7;20:21;21:13,18; 22:5,6;30:4;31:24; 35:18,19;36:16	<b>current (1)</b> 28:14	<b>discovery (2)</b> 5:13;31:3	<b>email (2)</b> 34:18;37:8
<b>concluded (1)</b> 37:17	<b>counsel's (1)</b> 18:2	<b>currently (1)</b> 16:10	<b>discussions (1)</b> 36:18	<b>emailed (1)</b> 10:23
<b>conduct (1)</b> 5:13	<b>course (2)</b> 8:16;32:2	<b>cuts (1)</b> 10:19	<b>disk (1)</b> 35:12	<b>emails (3)</b> 32:14;34:10,12
<b>conference (1)</b> 32:7	<b>COURT (178)</b> 5:2,16,22;6:5,10, 18,21,23,24;7:2,4,9, 10,14,17,22;8:4,7; 9:4,7,14,16,18,20; 10:4,7,10,12,18;11:2, 8,13,19,22,25;12:2,3, 5,7,8,8,11,15,19,21, 25;13:4,10,16,25; 14:4,7,9,10,14,17,19; 15:1,2,5,8,10,13,17, 20,23;16:1,5,8,22; 17:1,15,23,23,24,25; 18:5,7,13,16,18; 19:23,25;20:3,6,9,11, 13,17,19,20,23;21:1, 10,12,16,18,21,24; 22:2,11,13,14,16,23, 25;23:3,4,9,22,24; 24:8,10,17,20,22,24; 25:19,23;26:1,5,8,12, 14,14,17,23;27:6,10, 14,16,18;28:3,17,19, 23;29:4,7,11;30:1,7, 15,23;31:12,14,16; 32:8,16;33:9,20,25; 34:2,4,6,9,12,16,18, 20,22,25;35:2,5,8,10, 17,25;36:3,5,8,12,23,	<b>D</b>	<b>dismissed (1)</b> 10:24	<b>emergency (1)</b> 15:2
<b>confirming (1)</b> 27:25		<b>date (3)</b> 31:18;32:5;33:13	<b>distinct (1)</b> 8:10	<b>end (1)</b> 32:22
<b>conflict (1)</b> 8:11		<b>dates (1)</b> 32:9	<b>distinction (1)</b> 8:17	<b>engage (1)</b> 26:20
<b>consented (1)</b> 5:18		<b>day (6)</b> 30:20;32:12,13,22, 23;37:11	<b>district (3)</b> 15:2;26:12,14	<b>enter (1)</b> 30:8
<b>consequences (1)</b> 30:8		<b>days (3)</b> 17:17;31:23;32:10	<b>Division (1)</b> 4:12	<b>entered (4)</b> 5:12,14;12:3;15:3
<b>consideration (1)</b> 23:6		<b>deadline (6)</b> 31:2;32:17,18,19; 33:11,18	<b>docket (3)</b> 5:12,14,16	<b>entertain (1)</b> 30:2
<b>constitute (1)</b> 12:23		<b>deals (1)</b> 10:20	<b>documents (23)</b> 5:10,21,25;6:3,12; 15:14;16:12;19:9,13; 21:2,3;23:14;25:12, 15;30:13,24;31:16, 17,20;32:1,4,6;33:16	<b>entity (4)</b> 10:15;11:10,11; 16:4
<b>constitutes (1)</b> 13:1		<b>debtor (33)</b> 5:17;7:2,3,5,5,8,9, 12,25;8:9,15,18;9:2, 22,23;10:17;13:6,7; 14:23;16:14,25;17:2, 4,4,9,13;18:13;27:4, 25;31:7,19,21,22	<b>dollars (4)</b> 11:5,9;23:17;25:4	<b>envision (1)</b> 28:18
<b>Constitution (1)</b> 13:20		<b>Debtor's (3)</b> 4:21;8:9;16:17	<b>done (4)</b> 10:24;14:11;18:6, 22	<b>equity (2)</b> 8:21,22
<b>contact (3)</b> 23:11;28:7;36:17		<b>decide (1)</b> 8:23	<b>doors (1)</b> 18:2	<b>ESQ (2)</b> 4:8,17
<b>contempt (5)</b> 15:11;19:10;20:20; 30:5,15		<b>decision-maker (1)</b> 10:15	<b>drawing (1)</b> 8:17	<b>essence (1)</b> 13:22
<b>continue (1)</b> 13:25		<b>delta (1)</b> 24:7	<b>drawn (3)</b> 23:13,19;24:5	<b>estate (10)</b> 9:2;14:10;16:2,12, 20;18:6;29:18,18,19, 20
<b>continuing (2)</b> 13:18;36:14		<b>demand (1)</b> 25:4	<b>during (1)</b> 11:15	<b>even (3)</b> 16:24;19:6;35:18
<b>control (1)</b> 16:11		<b>demand (1)</b> 25:4	<b>duties (1)</b> 29:23	<b>Everybody (1)</b> 10:25
<b>conversion (6)</b> 10:1;14:24,24; 15:5;19:11;36:20		<b>denying (1)</b> 15:3	<b>E</b>	<b>everyone (1)</b> 9:21
<b>converted (1)</b> 14:17			<b>earlier (1)</b>	<b>exact (2)</b> 25:11,13
				<b>exactly (2)</b> 8:4;24:21

October 13, 2016

except (1) 20:15	files (2) 28:16;32:25	33:18	harder (2) 19:7,17	identified (2) 17:18,20
Excuse (1) 7:1	final (3) 5:10;6:17;37:9	general (1) 13:11	harm (1) 17:11	immediately (3) 17:20;23:18;36:17
executed (3) 23:14;25:15,15	financial (3) 33:23,24;34:14	gets (1) 17:7	healthy (1) 32:19	important (2) 7:17;13:13
existence (1) 19:10	financing (1) 21:8	Given (3) 21:12;32:18;33:1	hear (2) 30:18;33:12	impose (2) 30:18;35:20
existing (1) 9:24	fine (6) 9:14,16;28:19; 33:5;36:10,11	gives (1) 32:24	heard (4) 6:18,19;10:22;11:4	impression (1) 10:24
exists (1) 13:7	finished (1) 37:11	Gmail (1) 34:22	hearing (5) 5:15;18:23;24:6; 28:7;36:9	include (1) 31:6
experience (1) 10:16	fire (1) 17:14	good (4) 17:18;23:24;31:24; 36:8	Hello (1) 10:11	includes (3) 13:21;32:2;34:6
explain (1) 11:23	first (10) 5:10;6:2;10:21,22; 17:16;20:4;29:13,25; 32:10;35:21	granted (1) 6:16	help (1) 32:8	including (1) 29:23
explained (1) 23:4	five (1) 10:22	granting (1) 37:9	hide (1) 21:4	incriminate (1) 13:22
expose (1) 13:23	focusing (1) 7:10	great (2) 13:1;31:13	higher (1) 23:5	indicated (4) 6:11;21:12;23:7; 29:1
extension (2) 31:2,19	folks (2) 5:2;37:14	GUARINO (108) 4:21;6:23;7:6,21, 23:8;18,21,25;9:7,24; 10:5,6,9,11,13,13,19; 11:3,10,15,21,24; 12:1,4,6,10,14,18,20, 24;13:3,9,15,24;14:5, 8,12,16,18,25;15:4,7, 9,12,16,19,22,25; 16:3,6,16,23;17:3,5, 7,13,17;18:10,12,15, 17,20;19:23,24;20:2, 5,7,10,12,14,18,20, 24;21:2,11,15,17,20, 23,25;24:25;25:2; 26:19;30:6;31:21,23; 33:11,14,15,19,21; 34:1,3,5,8,10,13,15, 17,19,21,24;35:1,4,7, 9,14;36:21	hire (2) 17:14;21:13	indicates (1) 14:3
extent (5) 12:15;13:6;16:16; 17:7;26:18	followed (1) 12:5	Guarino's (1) 36:15	hold (2) 25:5,6	indicating (2) 12:21;30:10
extra (2) 32:12,23	forget (1) 18:25	guy (1) 10:19	holder (2) 8:21,23	indictment (1) 6:7
extremely (1) 29:21	form (1) 34:25		holders (1) 9:3	individual (3) 8:19;9:11;31:21
<b>F</b>	forth (2) 10:20;12:25	<b>H</b>	holding (2) 26:24;32:5	information (1) 33:16
	found (3) 11:6;20:18;21:2		holiday (1) 30:16	injunctive (1) 37:9
fact (1) 6:24	four (1) 10:22		holidays (4) 20:15;30:16,17; 36:7	insofar (2) 9:11;36:15
facts (3) 11:23;14:7;19:3	frame (1) 22:3		Honor (24) 5:11,17;6:13,22; 8:2;10:5;16:10,19; 17:16,17;22:22;24:3; 27:22;28:13;29:17; 30:6,21;31:17;32:4, 7;35:15;36:24;37:5, 15	instead (1) 18:19
Fair (1) 21:17	free (1) 21:6		Honor's (2) 5:9;10:1	institutional (1) 16:18
far (4) 9:4;18:21;21:2,4	front (1) 32:7		hopefully (1) 29:22	instruction (1) 17:3
fashion (1) 12:19	full (1) 19:17		hoping (1) 26:12	instructions (2) 27:8;28:11
federal (1) 6:7	fully (1) 21:8		hours (1) 33:4	insufficient (5) 24:3,4,8,9,10
feels (1) 17:8	fund (1) 27:14	hallway (1) 21:3	how/if (1) 22:5	intangible (1) 16:13
fees (5) 25:6;26:2,3;27:4; 31:25	funds (13) 14:9;15:13;16:1; 23:16;25:2;27:25; 28:14;29:12;30:10, 12;31:4,7;36:18	handwritten (1) 23:13	hundred (2) 27:18,20	intended (1) 8:3
few (2) 17:17;31:23	further (4) 21:14;26:20;30:12; 36:12	happen (2) 19:13;36:21	hundred-dollar (1) 33:5	intention (1) 7:19
fiduciary (2) 9:1;28:11		happened (3) 19:6;25:7,17		interest (1) 24:19
Fifth (1) 13:20		happening (1) 10:23		interest- (1) 9:2
figure (1) 19:2		happens (1) 8:21		interested (1) 21:22
file (4) 5:16;22:10;24:15; 29:19	<b>G</b>	happy (1) 13:25	<b>I</b>	interests (1) 8:10
filed (4) 22:21;25:11,11; 29:24	GABRIELA (1) 4:17	hard (3) 13:17;18:24;19:6	idea (3) 14:11;17:18;31:24	interface (1) 17:10
	gathering (1)			interim (1) 5:8

<b>into (3)</b> 6:12;28:10;31:3 <b>investigate (1)</b> 16:21 <b>inviolable (1)</b> 17:4 <b>invocation (1)</b> 13:19 <b>involved (1)</b> 26:10 <b>involves (1)</b> 19:17 <b>IOLA (6)</b> 23:13,17,19,21; 24:5;28:1 <b>ironic (1)</b> 18:8 <b>issue (7)</b> 10:21;11:4;20:8; 22:1;26:21;27:9; 36:13 <b>issued (1)</b> 10:2 <b>issues (2)</b> 11:1;17:18 <b>iteration (1)</b> 25:3	<b>learned (1)</b> 29:4 <b>least (3)</b> 6:11;24:2,4 <b>leave (2)</b> 11:5,9 <b>led (1)</b> 14:11 <b>leeway (1)</b> 35:17 <b>left (3)</b> 14:9;25:21;31:25 <b>legal (2)</b> 13:11;33:23 <b>lender (1)</b> 10:17 <b>less (1)</b> 17:12 <b>letter (3)</b> 22:10,11;23:7 <b>level (3)</b> 11:22;19:11;31:9 <b>levy (1)</b> 33:5 <b>liability (2)</b> 12:17;13:23 <b>light (1)</b> 18:8 <b>limited (1)</b> 29:23 <b>line (2)</b> 8:24;29:13 <b>liquidity (1)</b> 21:5 <b>listen (1)</b> 13:25 <b>literal (1)</b> 8:13 <b>Litigation (3)</b> 4:12;26:11,21 <b>little (2)</b> 35:17,20 <b>LLC (1)</b> 10:14 <b>Local (1)</b> 17:22 <b>look (5)</b> 6:3;29:12;32:25; 33:15;37:13	<b>matter (5)</b> 5:4;6:8;13:12; 34:2;37:1 <b>matters (1)</b> 5:8 <b>may (8)</b> 5:11;6:19,19; 13:20,21;16:17; 28:13;35:18 <b>maybe (1)</b> 17:11 <b>mean (10)</b> 7:25;8:1,2;16:23, 24;17:10;26:11; 28:20,24;30:22 <b>means (1)</b> 15:10 <b>meant (4)</b> 7:14,25;8:13,14 <b>member (2)</b> 10:14;31:21 <b>merely (1)</b> 8:17 <b>message (1)</b> 35:2 <b>messages (1)</b> 34:15 <b>messenger (1)</b> 27:24 <b>microphone (1)</b> 10:7 <b>midst (1)</b> 5:3 <b>might (3)</b> 8:23,23;36:19 <b>mind (2)</b> 8:25;36:19 <b>misspeak (1)</b> 6:25 <b>misspoke (1)</b> 7:14 <b>misunderstanding (1)</b> 27:11 <b>moment (2)</b> 11:20;17:12 <b>moments (1)</b> 15:3 <b>Monday (1)</b> 32:23 <b>money (12)</b> 16:12;19:8,12; 21:5,16;23:25;25:20; 27:8;28:10;29:13,25; 30:2 <b>monies (1)</b> 19:1 <b>more (4)</b> 6:6;11:17;22:25; 35:17 <b>morning (1)</b> 36:10 <b>most (1)</b> 18:19	<b>motion (5)</b> 6:16;17:22;18:9; 19:19;34:13 <b>move (1)</b> 10:20 <b>moving (1)</b> 22:4 <b>much (3)</b> 20:3,25;37:16 <b>multiplying (1)</b> 18:9 <b>myself (1)</b> 20:8	<b>NY (2)</b> 4:6,15
<b>O</b>				
<b>N</b>				
<b>JAMES (3)</b> 4:21;10:5,13 <b>Judge (8)</b> 5:6;15:1,2;19:20; 22:19;23:10;36:9,11 <b>jump (1)</b> 35:20 <b>JUSTICE (1)</b> 4:2	<b>light (1)</b> 18:8 <b>limited (1)</b> 29:23 <b>line (2)</b> 8:24;29:13 <b>liquidity (1)</b> 21:5 <b>listen (1)</b> 13:25 <b>literal (1)</b> 8:13 <b>Litigation (3)</b> 4:12;26:11,21 <b>little (2)</b> 35:17,20 <b>LLC (1)</b> 10:14 <b>Local (1)</b> 17:22 <b>look (5)</b> 6:3;29:12;32:25; 33:15;37:13	<b>means (1)</b> 15:10 <b>meant (4)</b> 7:14,25;8:13,14 <b>member (2)</b> 10:14;31:21 <b>merely (1)</b> 8:17 <b>message (1)</b> 35:2 <b>messages (1)</b> 34:15 <b>messenger (1)</b> 27:24 <b>microphone (1)</b> 10:7 <b>midst (1)</b> 5:3 <b>might (3)</b> 8:23,23;36:19 <b>mind (2)</b> 8:25;36:19 <b>misspeak (1)</b> 6:25 <b>misspoke (1)</b> 7:14 <b>misunderstanding (1)</b> 27:11 <b>moment (2)</b> 11:20;17:12 <b>moments (1)</b> 15:3 <b>Monday (1)</b> 32:23 <b>money (12)</b> 16:12;19:8,12; 21:5,16;23:25;25:20; 27:8;28:10;29:13,25; 30:2 <b>monies (1)</b> 19:1 <b>more (4)</b> 6:6;11:17;22:25; 35:17 <b>morning (1)</b> 36:10 <b>most (1)</b> 18:19	<b>name (2)</b> 10:5,13 <b>need (10)</b> 6:14;8:23;19:9; 20:3,24;27:4;28:10; 29:25;30:18;35:8 <b>needs (6)</b> 8:23;18:22;30:7; 33:3;34:4;36:17 <b>Neil (2)</b> 5:6;23:10 <b>neither (1)</b> 9:22 <b>neither/nor (1)</b> 9:22 <b>New (3)</b> 4:6,11,15 <b>news (1)</b> 23:24 <b>next (1)</b> 19:11 <b>nice (1)</b> 10:7 <b>night (1)</b> 11:6 <b>noncompliance (1)</b> 36:14 <b>non-litigious (1)</b> 10:20 <b>nor (1)</b> 9:22 <b>normally (1)</b> 13:16 <b>notes (1)</b> 37:13 <b>notice (1)</b> 17:22 <b>notion (1)</b> 18:25 <b>nowhere (1)</b> 21:9 <b>number (4)</b> 8:14;13:4,4;17:19 <b>numbers (1)</b> 29:12 <b>numerous (4)</b> 12:2,7,12,13	<b>objection (2)</b> 5:24;6:4 <b>objections (2)</b> 5:18;6:13 <b>obligation (1)</b> 9:1 <b>obligations (1)</b> 16:17 <b>observation (1)</b> 12:22 <b>observed (1)</b> 16:11 <b>obtain (1)</b> 32:3 <b>obviously (1)</b> 17:6 <b>occasions (1)</b> 12:12 <b>occurred (2)</b> 8:11;12:8 <b>o'clock (2)</b> 31:1;36:12 <b>October (3)</b> 5:15;30:24;31:19 <b>off (1)</b> 14:2 <b>offered (1)</b> 21:7 <b>Office (4)</b> 4:3,13;27:24;36:23 <b>officer (2)</b> 7:24;13:5 <b>oftentimes (1)</b> 8:10 <b>once (4)</b> 10:16;21:18;24:13, 15 <b>one (8)</b> 8:15;11:4;13:4; 18:19;27:20;30:21; 32:13;37:12 <b>onerous (1)</b> 35:20 <b>only (4)</b> 9:1;11:25;29:8; 35:18 <b>open (1)</b> 18:2 <b>opportunity (1)</b> 19:21 <b>oppressive (1)</b> 30:22 <b>order (24)</b> 5:10,13,14,14,15; 10:1,2,3;14:10,24,24; 15:3,5,5,11;19:11; 26:13,20;29:11;30:5, 17;32:2;33:8;37:8
<b>K</b>				
<b>keep (3)</b> 5:3;22:3,4 <b>keeping (1)</b> 26:1 <b>knowing (1)</b> 35:19 <b>knowledge (3)</b> 11:1,2;16:18	<b>LLC (1)</b> 10:14 <b>Local (1)</b> 17:22 <b>look (5)</b> 6:3;29:12;32:25; 33:15;37:13	<b>misunderstanding (1)</b> 27:11 <b>moment (2)</b> 11:20;17:12 <b>moments (1)</b> 15:3 <b>Monday (1)</b> 32:23 <b>money (12)</b> 16:12;19:8,12; 21:5,16;23:25;25:20; 27:8;28:10;29:13,25; 30:2 <b>monies (1)</b> 19:1 <b>more (4)</b> 6:6;11:17;22:25; 35:17 <b>morning (1)</b> 36:10 <b>most (1)</b> 18:19	<b>noncompliance (1)</b> 36:14 <b>non-litigious (1)</b> 10:20 <b>nor (1)</b> 9:22 <b>normally (1)</b> 13:16 <b>notes (1)</b> 37:13 <b>notice (1)</b> 17:22 <b>notion (1)</b> 18:25 <b>nowhere (1)</b> 21:9 <b>number (4)</b> 8:14;13:4,4;17:19 <b>numbers (1)</b> 29:12 <b>numerous (4)</b> 12:2,7,12,13	<b>off (1)</b> 14:2 <b>offered (1)</b> 21:7 <b>Office (4)</b> 4:3,13;27:24;36:23 <b>officer (2)</b> 7:24;13:5 <b>oftentimes (1)</b> 8:10 <b>once (4)</b> 10:16;21:18;24:13, 15 <b>one (8)</b> 8:15;11:4;13:4; 18:19;27:20;30:21; 32:13;37:12 <b>onerous (1)</b> 35:20 <b>only (4)</b> 9:1;11:25;29:8; 35:18 <b>open (1)</b> 18:2 <b>opportunity (1)</b> 19:21 <b>oppressive (1)</b> 30:22 <b>order (24)</b> 5:10,13,14,14,15; 10:1,2,3;14:10,24,24; 15:3,5,5,11;19:11; 26:13,20;29:11;30:5, 17;32:2;33:8;37:8
<b>L</b>				
<b>Last (7)</b> 5:17;6:15;11:6; 18:23;20:18;23:1; 30:23 <b>LAW (2)</b> 4:11;11:14 <b>lawyer (2)</b> 9:13;11:18 <b>leads (1)</b> 23:16	<b>M</b> <b>makes (1)</b> 11:17 <b>making (2)</b> 9:17;12:15 <b>managing (1)</b> 10:14 <b>many (1)</b> 10:17 <b>MASUMOTO (5)</b> 4:8;36:23,24,25; 37:1	<b>misunderstanding (1)</b> 27:11 <b>moment (2)</b> 11:20;17:12 <b>moments (1)</b> 15:3 <b>Monday (1)</b> 32:23 <b>money (12)</b> 16:12;19:8,12; 21:5,16;23:25;25:20; 27:8;28:10;29:13,25; 30:2 <b>monies (1)</b> 19:1 <b>more (4)</b> 6:6;11:17;22:25; 35:17 <b>morning (1)</b> 36:10 <b>most (1)</b> 18:19	<b>noncompliance (1)</b> 36:14 <b>non-litigious (1)</b> 10:20 <b>nor (1)</b> 9:22 <b>normally (1)</b> 13:16 <b>notes (1)</b> 37:13 <b>notice (1)</b> 17:22 <b>notion (1)</b> 18:25 <b>nowhere (1)</b> 21:9 <b>number (4)</b> 8:14;13:4,4;17:19 <b>numbers (1)</b> 29:12 <b>numerous (4)</b> 12:2,7,12,13	<b>only (4)</b> 9:1;11:25;29:8; 35:18 <b>open (1)</b> 18:2 <b>opportunity (1)</b> 19:21 <b>oppressive (1)</b> 30:22 <b>order (24)</b> 5:10,13,14,14,15; 10:1,2,3;14:10,24,24; 15:3,5,5,11;19:11; 26:13,20;29:11;30:5, 17;32:2;33:8;37:8

<b>ordered (1)</b> 33:9 <b>orders (2)</b> 9:24;12:2 <b>original (3)</b> 31:2,18;32:19 <b>others (1)</b> 22:2 <b>ought (4)</b> 13:12;16:12;23:17; 37:3 <b>out (17)</b> 11:6,17;16:1;18:2, 11:19;2:20;18;21:2; 23:21;24:5;25:8,9,9; 32:8,19,23,24 <b>outside (2)</b> 10:23;21:7 <b>over (12)</b> 15:14;21:3;23:18; 26:21;27:5,8;30:13; 31:4,10;32:13;34:4; 35:8 <b>own (1)</b> 8:24	<b>permitted (1)</b> 13:11 <b>person (4)</b> 8:8;11:8;29:8; 33:16 <b>personal (4)</b> 8:1;15:23;16:17; 18:21 <b>personally (6)</b> 7:7,21;8:25;11:11; 15:11;33:6 <b>phase (1)</b> 28:25 <b>phone (4)</b> 20:24;33:14;35:11, 18 <b>physical (1)</b> 35:12 <b>picture (1)</b> 31:9 <b>place (1)</b> 8:16 <b>plan (1)</b> 20:21 <b>pleadings (1)</b> 12:13 <b>Please (2)</b> 5:2;33:8 <b>pledge (1)</b> 21:7 <b>plenty (1)</b> 10:16 <b>Plus (2)</b> 26:1,3 <b>PM (1)</b> 37:17 <b>pocket (1)</b> 18:11 <b>point (12)</b> 7:17;8:22;9:6;13:4, 4,10;22:5;28:16,20; 29:15;30:22;36:13 <b>position (3)</b> 7:20;13:17;19:18 <b>possession (1)</b> 15:14 <b>possible (1)</b> 12:16 <b>possibly (1)</b> 12:21 <b>powers (1)</b> 14:20 <b>precisely (1)</b> 7:10 <b>prefer (3)</b> 27:23;28:5;33:13 <b>prepared (1)</b> 18:1 <b>preparing (1)</b> 29:23 <b>PRESENT (1)</b> 4:20 <b>presented (1)</b>	25:10 <b>preservation (1)</b> 6:14 <b>preserve (1)</b> 5:10 <b>pretend (1)</b> 19:5 <b>pretty (1)</b> 15:15 <b>previous (1)</b> 20:21 <b>Principal (10)</b> 4:21;7:3,5,8,9,15; 8:10;13:5;17:4,13 <b>privilege (3)</b> 13:7,13;33:17 <b>probably (1)</b> 32:15 <b>problem (10)</b> 16:3;21:20,23; 28:4;31:11;33:19,20, 21;35:1;36:22 <b>proceedings (1)</b> 37:17 <b>process (3)</b> 11:16;18:4;21:6 <b>produce (1)</b> 30:24 <b>produced (3)</b> 19:9;32:1,5 <b>producing (1)</b> 33:18 <b>production (9)</b> 32:15,17,18,21; 33:2,13,22;35:13; 36:15 <b>properly (1)</b> 16:11 <b>property (3)</b> 14:20;16:12;28:16 <b>provide (1)</b> 30:17 <b>pull (1)</b> 10:7 <b>purchaser (1)</b> 25:9 <b>pursuant (2)</b> 10:3;25:3 <b>pursue (1)</b> 14:20 <b>push (1)</b> 32:13 <b>put (1)</b> 22:6 <b>putting (1)</b> 21:4	<b>R</b>  <b>rate (3)</b> 22:14;23:5,6 <b>rather (1)</b> 31:24 <b>reach (1)</b> 20:16 <b>real (2)</b> 8:9;28:16 <b>really (2)</b> 22:6;32:25 <b>reasonable (2)</b> 32:15,16 <b>recall (2)</b> 5:11;31:6 <b>recalling (1)</b> 28:25 <b>receipts (1)</b> 29:18 <b>received (4)</b> 5:18;22:19;23:14; 31:7 <b>record (5)</b> 10:8;16:10;29:1; 33:8,9 <b>records (5)</b> 6:12,14;33:23,24; 34:14 <b>refinancing (1)</b> 21:7 <b>refrain (1)</b> 21:13 <b>regard (2)</b> 14:1;33:10 <b>rejected (1)</b> 19:20 <b>relating (2)</b> 34:2;35:6 <b>relief (2)</b> 5:18;37:9 <b>relieved (1)</b> 16:19 <b>remaining (1)</b> 30:12 <b>remedies (1)</b> 14:21 <b>remit (1)</b> 30:10 <b>render (1)</b> 32:9 <b>replace (3)</b> 14:13;16:6;17:5 <b>replaced (1)</b> 14:14 <b>represent (5)</b> 5:7;7:7,21;9:2;16:3 <b>representation (3)</b> 6:3;8:25;31:6 <b>represented (4)</b> 6:1;9:8,10;16:15 <b>representing (1)</b>	7:6 <b>request (2)</b> 5:9;14:13 <b>requested (2)</b> 25:4;31:19 <b>require (1)</b> 19:1 <b>required (2)</b> 12:8;30:13 <b>requires (1)</b> 17:22 <b>respect (5)</b> 9:1,2;18:13;30:9; 33:11 <b>respond (1)</b> 24:25 <b>response (3)</b> 9:5;31:2,18 <b>responsive (1)</b> 23:12 <b>retain (1)</b> 29:22 <b>retained (1)</b> 36:17 <b>return (4)</b> 24:15;28:16;29:23; 36:18 <b>returned (2)</b> 15:13;30:3 <b>returns (2)</b> 29:20,20 <b>revisit (1)</b> 36:13 <b>Right (43)</b> 12:4,6,10,14; 13:21;14:2,18,25; 15:4,7,9,11,18,25; 16:3,20;17:5,14,25; 18:5,16;19:9;22:13, 16,23;23:2,3,10;24:1, 12,24;27:15;29:3,6, 10;30:4,4;31:1,14; 35:25;36:21;37:3,6 <b>rights (2)</b> 14:20,21 <b>room (1)</b> 15:21 <b>Rule (2)</b> 5:13;10:2 <b>Rules (1)</b> 17:22 <b>run (1)</b> 31:24
				<b>S</b>  <b>sale (2)</b> 11:16;23:5 <b>same (3)</b> 33:13,18;35:15 <b>sanctioning (1)</b> 19:11 <b>sanctions (3)</b>

October 13, 2016

30:8,18;36:14 <b>satisfy (1)</b> 36:19 <b>Saturday (1)</b> 32:23 <b>saying (4)</b> 12:16;13:22;16:7,24 <b>scary (1)</b> 20:21 <b>scheduling (2)</b> 5:14,15 <b>seat (1)</b> 5:2 <b>second (1)</b> 6:6 <b>seeking (1)</b> 8:14 <b>seems (2)</b> 8:11;26:19 <b>Segal (2)</b> 5:7,7 <b>send (5)</b> 6:3;27:7,8,23,24 <b>sending (2)</b> 5:20,25 <b>sensitive (1)</b> 18:4 <b>sent (2)</b> 5:20;23:12 <b>separate (2)</b> 8:23,24 <b>September (1)</b> 5:12 <b>serious (2)</b> 12:19;15:15 <b>served (2)</b> 17:9,9 <b>service (1)</b> 5:16 <b>set (1)</b> 32:17 <b>sets (1)</b> 12:25 <b>share (1)</b> 37:4 <b>short (1)</b> 30:2 <b>shot (1)</b> 35:21 <b>side (1)</b> 18:10 <b>significant (1)</b> 24:19 <b>Simchat (1)</b> 36:3 <b>simple (3)</b> 10:25;19:8;33:1 <b>simply (6)</b> 8:12;28:9;31:5;33:15,17;35:18 <b>sitting (3)</b> 17:19;25:22;36:25	<b>situation (4)</b> 13:16;18:18;22:7;28:14 <b>somebody (4)</b> 17:14;20:16;28:20;37:3 <b>someone (3)</b> 12:22;13:17;18:3 <b>soon (2)</b> 17:20;36:16 <b>soon-to-be-retained (1)</b> 35:10 <b>sorry (5)</b> 5:3;20:10;28:24;30:21;33:19 <b>sought (2)</b> 12:9;14:24 <b>sounds (1)</b> 31:24 <b>speak (4)</b> 7:23;9:12,20;13:18 <b>speaking (2)</b> 10:13;17:20 <b>specter (1)</b> 18:9 <b>spoke (2)</b> 5:23;6:15 <b>squarely (1)</b> 19:19 <b>stand (1)</b> 8:12 <b>standing (1)</b> 18:1 <b>start (1)</b> 5:5 <b>started (1)</b> 28:25 <b>statement (3)</b> 9:7;27:25;30:11 <b>statements (1)</b> 12:16 <b>STATES (2)</b> 4:2,3 <b>status (1)</b> 36:13 <b>statute (1)</b> 12:25 <b>stay (8)</b> 14:24;15:3;18:8;19:18,19;26:11,12,20 <b>stayed (2)</b> 15:8;26:15 <b>still (11)</b> 16:25;17:2;19:3;16:22;16,16;23:17;26:5,7;31:20;36:2 <b>stop (1)</b> 11:19 <b>straight (1)</b> 24:25 <b>Street (3)</b> 4:4,14;10:14 <b>stuff (3)</b>	26:11;33:24;34:14 <b>subject (1)</b> 12:17 <b>submitting (1)</b> 32:2 <b>subpoena (5)</b> 5:20;6:8;17:6;23:12;33:15 <b>subpoenas (2)</b> 10:2;31:18 <b>substantial (2)</b> 7:4;24:23 <b>substitution (1)</b> 17:21 <b>sufficient (1)</b> 24:11 <b>suggest (2)</b> 13:17;32:11 <b>suggested (1)</b> 19:6 <b>Suite (1)</b> 4:5 <b>Sukkot (2)</b> 32:9,10 <b>Sullivan (2)</b> 15:1;19:20 <b>Sunday (1)</b> 32:24 <b>super (1)</b> 19:5 <b>sure (5)</b> 8:1;20:17;29:14;33:22;34:10	30:19 <b>times (1)</b> 6:1 <b>title (7)</b> 5:20;11:6;22:19;23:11,15;25:10,13 <b>today (11)</b> 5:9;9:9,22;12:16;17:9;18:1;20:15;30:8,15,18;31:19 <b>today's (2)</b> 5:15;28:7 <b>together (1)</b> 35:12 <b>Togut (3)</b> 5:7,7;29:8 <b>told (3)</b> 6:2;11:18;25:16 <b>tomorrow (1)</b> 32:24 <b>top (1)</b> 14:2 <b>Torah (1)</b> 36:3 <b>touch (2)</b> 5:19,25 <b>transfer (19)</b> 11:7;19:2;20:5;22:8;23:14,19,25;24:6;25:14,15,17,20;27:1;28:5,16;29:2,7,19,23 <b>transferred (5)</b> 25:2,5,5;26:9;28:1 <b>transparent (1)</b> 21:25 <b>tried (1)</b> 20:14 <b>troubling (1)</b> 14:2 <b>trust (1)</b> 27:14 <b>Trustee (32)</b> 4:3;5:8,13;8:16;10:3;14:15,19,22;15:14;16:11,24;17:10;18:14;19:12;21:21,22;22:5;23:11,18;26:9;27:4,7;28:2,10,15,21;29:22;30:1,10;31:4,25;33:17 <b>trustee's (4)</b> 5:9,11;16:15;28:11 <b>try (1)</b> 6:12 <b>trying (1)</b> 8:13 <b>Tuesday (2)</b> 32:24;36:1 <b>turn (3)</b> 26:21;30:13;35:8 <b>turned (6)</b> 15:14;21:3;23:18;	27:5;31:10;34:4 <b>turnover (1)</b> 26:13 <b>turns (1)</b> 31:4 <b>twenty-four (1)</b> 33:4 <b>two (5)</b> 5:8;6:1;13:4;18:19;32:10 <b>type (1)</b> 16:20
<b>U</b>				
<b>ultimately (1)</b> 29:24 <b>Um-hum (1)</b> 10:18 <b>unable (1)</b> 16:16 <b>uncashed (1)</b> 25:24 <b>unclear (1)</b> 22:4 <b>under (5)</b> 6:7;10:24;17:6,22;28:14 <b>Underst (1)</b> 26:25 <b>understands (1)</b> 8:8 <b>Understood (5)</b> 8:20;13:24;27:2;30:14;33:7 <b>UNISON (1)</b> 37:15 <b>UNITED (2)</b> 4:2,3 <b>unless (1)</b> 6:15 <b>unrelated (1)</b> 6:9 <b>up (7)</b> 5:2;8:12;15:5;17:12;20:20;30:17;31:25 <b>update (1)</b> 5:19 <b>used (1)</b> 20:22 <b>using (1)</b> 20:21				
<b>V</b>				
<b>valuable (1)</b> 11:17 <b>Varick (1)</b> 4:4 <b>various (1)</b> 14:21 <b>vested (1)</b>				

14:22 <b>views (1)</b> 12:12 <b>violation (1)</b> 11:13 <b>voluminous (1)</b> 33:1	<b>words (2)</b> 7:11;8:13 <b>work (3)</b> 29:20;32:12;35:11 <b>write (1)</b> 28:6 <b>writing (1)</b> 29:1 <b>written (3)</b> 27:25;31:6;35:2	5:15 <b>20th (5)</b> 32:6,11,15,22;33:3 <b>22nd (1)</b> 5:12 <b>23,000 (1)</b> 23:8 <b>24th (1)</b> 36:5 <b>25th (2)</b> 36:1,6 <b>26th (2)</b> 36:8,12 <b>29th (1)</b> 31:18		
<b>W</b>				
<b>wait (1)</b> 18:3 <b>waiting (2)</b> 5:3;25:25 <b>waiver (1)</b> 16:20 <b>waives (1)</b> 13:12 <b>wants (5)</b> 7:8;9:11;11:16; 17:5;26:19 <b>way (11)</b> 5:19;18:24,24,25; 19:5,6,17,17;27:22; 31:8;35:19 <b>Wednesday (2)</b> 32:5,25 <b>week (2)</b> 20:18;30:25 <b>weeks (2)</b> 10:22;32:19 <b>weigh (1)</b> 16:8 <b>weren't (4)</b> 19:2,3;25:15,16 <b>what's (3)</b> 10:23;16:18;25:17 <b>whenever (1)</b> 28:14 <b>Whereupon (1)</b> 37:17 <b>whole (1)</b> 18:25 <b>who's (1)</b> 17:12 <b>willing (1)</b> 30:2 <b>willingness (1)</b> 6:11 <b>wire (5)</b> 27:8;28:5,10,10; 30:11 <b>wish (1)</b> 6:18 <b>Withdrawal (1)</b> 17:21 <b>within (1)</b> 15:2 <b>without (4)</b> 13:18;14:4,10; 35:21 <b>wondering (1)</b> 32:1	<b>Y</b> <b>Yahoo! (1)</b> 34:22 <b>York (3)</b> 4:6,11,15 <b>Z</b> <b>zero (1)</b> 27:12 <b>1</b> <b>100 (1)</b> 4:14 <b>100,000 (2)</b> 11:5,9 <b>10007 (1)</b> 4:15 <b>10014 (1)</b> 4:6 <b>1006 (1)</b> 4:5 <b>108 (1)</b> 5:16 <b>11 (1)</b> 36:12 <b>13th (1)</b> 31:20 <b>17th (2)</b> 32:11,13 <b>18th (2)</b> 32:11,13 <b>199 (1)</b> 10:14 <b>19th (3)</b> 32:5,14,17 <b>2</b> <b>2.65 (1)</b> 23:6 <b>2:30 (1)</b> 36:10 <b>2:59 (1)</b> 37:17 <b>2004 (2)</b> 5:13;10:2 <b>201 (1)</b> 4:4 <b>2016 (1)</b>	<b>3</b> <b>30,000 (8)</b> 23:16;24:5;25:4, 22;26:1,3,24;27:3 <b>4</b> <b>4 (1)</b> 31:1 <b>43,000 (2)</b> 23:7;24:7 <b>5</b> <b>5 (1)</b> 5:15 <b>7</b> <b>7 (2)</b> 5:8;16:15 <b>75 (1)</b> 5:12 <b>76 (1)</b> 5:14 <b>7th (4)</b> 10:14;30:24;31:1, 19		